United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, *Plaintiff in Error,* *vs.* ONE KISSEL TOURING AUTOMOBILE, San Francisco Securities Corporation, *Defendants in Error.*	No. 4127

BRIEF OF PLAINTIFF IN ERROR

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The libel or information in this case shows that the automobile involved was seized by a Government narcotic inspector within the District of Arizona on or about October 22, 1922; that said inspector at the time of seizure arrested the driver thereof, finding on his person a package of cocaine not bearing the revenue stamps required; that the tax provided by law had never been paid to the United States; that at the time of said arrest and seizure said driver was transporting said narcotics in said automobile and had removed them from a point in the District of Arizona unknown to a point in the City of Tucson in said

District for the purpose of making a sale thereof and that said removal was with the intent to defraud the United States of the taxes; that the driver was using said automobile as a means of removal; and that the automobile was held by said inspector as forfeited to the United States under Section 3450 of the Revised Statutes of the United States.

The San Francisco Securities Corporation filed an answer and claim to said libel alleging that it was the owner and entitled to the possession of said automobile and disclaimed any knowledge of or consent to said use and alleged that such use therefore does not constitute a violation of said Section 3450; prayed that said automobile be released and discharged and delivered to them.

The agreed statement of facts has been filed (Transcript of Record, p. 17) and this matter is to be submitted on briefs.

The holding of Judge Dooling in this District was adverse to the contention of the Government and from it this appeal has been taken.

ASSIGNMENTS OF ERROR

1. That the Court erred in sustaining the petition of claimant herein;

2. That the Court erred in not finding the automobile subject to confiscation under Section 3450, Revised Statutes, United States of America;

3. That the Court erred in dismissing plaintiff's libel;

4. That the Court erred in releasing the seized property from custody and returning same to the claimant.

ARGUMENT

Inasmuch as the law applicable to the questions raised by each of the errors assigned is so interwoven with that applicable to the others, they may well, for the purpose of argument, be here considered as one.

An analysis of the opinion of Judge Dooling in this case (said opinion being reported in 289 Federal Reporter 120) (Transcript of Record, p. 19) shows (1) that his construction of the words "removal" and "removed" is not synonymous with "transportation" or "transported," but has reference to the removal from some definite place, where the tax imposed is due, and where it should be paid before the taxed articles are taken therefrom; (2) that to warrant the forfeiture of an

automobile for deposit or concealment of drugs therein they must have been so deposited or concealed with intent to defraud the Government of the tax imposed on them and the burden of showing such intent is one the Government; (3) that the facts show that in this instance the concealment of the drugs by the driver is to be attributed to the fact that he knew that he was engaged in an unlawful business rather than to the fact that he was trying to evade the payment of the tax of one cent.

This decision is in a large measure based upon the construction of the provisions of Section 3450 R. S. (Comp. Stat. Paragraph 6452) which, so far as that part of it which relates to the facts herein concerned, reads as follows:

> "Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed * * * are removed or are deposited or concealed in any place with intent to defraud the United States of such tax, * * * every vessel, boat, cart, carriage, or other conveyance whatsoever * * * and all things used in the removal or for the deposit and concealment thereof respectively shall be forfeited."

The construction given this statute by Judge Dooling is one of extreme strictness. As to the manner in which the forfeiture provision of a

revenue statute should be construed the United States Supreme Court in the case of the United States vs. Stowell, 133 U. S. 1, 10 Supreme Court 244, 245, used the following language:

> "By the now settled doctrine of this Court * * * statutes to prevent frauds upon the revenue are considered as created for the public good and to suppress a public wrong and therefore although they impose penalties or forfeitures are not to be construed, like penal statutes generally, strictly in favor of the defendant; but they are to be fairly and reasonably construed, so as to carry out the intention of the legislature."

The Supreme Court of the United States further, in the case of Ash Sheep Company vs. United States, 252 U. S. 159, 40 Supreme Court 241, 4 Law Ed. 507, lays down the rule in the following words:

> "The admitted rule that penal statutes are to be strictly construed is not violated by allowing their words to have full meaning OR EVEN THE MORE EXTENDED OF TWO MEANINGS (*ours*) where such construction best harmonizes with the context and most fully promotes the policy and objects of the legislature."

As to the meaning of the word "remove" we cite the case of In Re Wilmington Hosiery Com-

pany, 120 Fed. 180, 182, which defines it in the following language:

> "The word 'removed' as employed in Bankruptcy Act, July 1, 1898, c 541 Paragraph 3a, Subdivision 1, 30 Statutes 546 (U. S. Comp. Stat. 1901, p. 3422), providing that acts of bankruptcy shall consist in having removed property with intent to hinder creditors, whether taken by itself or viewed in the light of the context, clearly signifies an actual or physical change in the position or locality of the property constituting the subject of the removal."

The Supreme Court of the State of Alabama in the case of Davis vs. the State, 68 Ala. 58, 44 American Reports 128, construed the act of said state of February 1, 1879, which made it unlawful to "transport or move" cotton in the seed during the nighttime, etc. In this case the indictment under such act used the words "transport or remove." It was held that the words "move" and "remove" as so used were equivalent in meaning.

We have but to examine the decisions of the courts of the various districts in cases similar to this to see that the forfeiture of automobiles for carrying or "removing" goods or commodities for or in respect whereof any tax is or shall be "imposed" is a common thing.

In the case of the United States vs. One Essex Touring Automobile et al., 266 Fed. 138 (District Court, Northern District Georgia, July 1, 1920), in the words of Sibley, District Judge:

> "The libel proceeds under Revised Statutes, Paragraph 3450 (Comp. Stat., Paragraph 6352), providing for the forfeiture of vehicles used for the removal, deposit or concealment of any article on which a tax is due and unpaid with intent to defraud the United States of the tax, and alleges that on April 20, 1920, the automobile libeled was used for the removal of eighty gallons of intoxicating distilled spirits with the intent aforesaid."

By demurrer the libel was sought to be dismissed on the ground that the remedy under R. S. Paragraph 3450, was inconsistent with the Eighteenth Amendment and Section 26 or Title 2 of the National Prohibition Act, but the Court held the forfeiture valid, stating that R. S. Paragraph 3450, deals only with untaxed liquor and may extend to cases of deposit and concealment as well as to cases of transportation, * * * and that the forfeiture arises from no illegality under the Prohibition Act, but wholly under the Revenue Law. The Court further stated that:

> "The causes of action are unlike and independent of each other. It is true that an automobile transporting untaxed intoxicating liquors without permit may transgress both

statutes at the same time, but that results only in giving the United States an election as to which cause of forfeiture it will pursue. Revised Statutes, Paragraph 3450, still has its place in the law and the remedy under it may be sustained in this case if the facts alleged are proven."

Later the same Court, in the case of the United States vs. One Essex Touring Automobile, 276 Federal Reporter 28, stating that the automobile in question there was libeled for condemnation under Revised Statutes 3450 (Comp, Stat. Paragraph 6352), * * * on the grounds that it was used by a person unknown for the removal, deposit and concealment of eighty gallons of distilled spirits in respect of which a tax was imposed which had not been paid, with intent to defraud the United States of the tax, went on to say:

"The question of repeal here raised was examined in this Court in One Essex Touring Automobile, 266 Federal 138, and the conclusion reached that forfeiture under Revised Statutes, Paragraph 3450, might be had notwithstanding the provisions of the National Prohibition Act. A review of this conclusion has now been had in the light of the case of the United States vs. Yuganovich, 256 U. S. 450, decided by the Supreme Court June 1, 1921. That case settles that the laws taxing distilled or other intoxicating liquors

are not repealed by the National Prohibition Act, but these remain 'goods or commodities in respect of which a tax is or shall be imposed' mentioned in Revised Statutes, Paragraph 3450."

Further, the Court made a statement in this opinion which is of considerable significance as displaying the view of that Court in this connection, when they use the following words:

"One may violate Revised Statutes, Paragraph 3450, by removing or concealing liquors on which a tax is due and unpaid with intent to defraud of the tax, even though he have all requisite permits for transportation and possession under the Prohibition Act. * * * Yet if he and the automobile were engaged in an effort to defraud the Government of the tax due, there is no more reason why the penalty for so doing should be relaxed in the case of distilled liquors than in the case of any other taxed articles. One may wonder why greater severity should be prescribed by Congress in the matter of forfeitures as well as penalties in protection of the revenue laws than in enforcing constitutional prohibition, but that is not a judicial problem."

The automobile in this case was forfeited. The same view of the law was held by the District Court, Southern District of Alabama, in the

case of the steamship Tuscan, reported in 276 Federal at page 55, forfeiture being claimed by the Government under Paragraph 3450 of said steamship for conveying, transporting and concealing liquors thereon with intent to defraud the United States of a tax.

The case of Rio Atlanta Company vs. Stern, 279 Federal Reporter 422, Sibley, District Judge, upheld a judgment forfeiting an automobile under Paragraph 3450, which recited that the automobile was used in transporting, concealing and depositing liquors on which a tax had not been paid.

The Supreme Court of the United States on January 17, 1921, in the case of J. W. Goldsmith, Jr.-Grant Company vs. United States, reported in 254 U. S. at page 505, Mr. Justice McReynolds dissenting, upheld the forfeiture of a Hudson automobile under Paragraph 3450, Revised Statutes, which said automobile it was charged was used by three persons in the removal and for the deposit and concealment of fifty-eight gallons of distilled spirits upon which a tax was imposed by the United States and had not been paid.

Though specific intent be essential its existence may be inferred from the circumstances under the usual rule that every sane man is presumed to intend the usual and probable consequences of his act. Thus an intent to commit

murder may be inferred from the use of a deadly weapon or other attendant circumstances in the absence of evidence negativing such intent (16 C. J. 116).

In 16 C. J. at page 81 in speaking of specific intent the author, while stating that the burden of proving specific intent is on the state, states also that the affirmative proof required may be "either by direct or circumstantial evidence * * * and that it is sufficient * * * to prove facts from which the specific intent may be inferred."

Recognizing the validity of Judge Dooling's holding herein that "the burden is upon the Government to show that such was the intent" (Transcript of Record, p. 21), may not specific intent be inferred from the facts set forth in the agreed statement of facts in this case (Transcript of Record, pp. 17, 18)?

Clearly we may not infer or draw from said statement of facts any intent on the part of the driver of the automobile herein involved to pay the tax due.

Every man is presumed to know the law; the driver here must be presumed to have known it, and that the law called for the payment of the tax. Are we to say that the automobile shall not be forfeited because the tax due on the narcotics in question amounted to only one cent and that

a different rule would apply if the quantity carried had been much greater? If the weight of the narcotics involved in this case, the other facts and circumstances being the same, had been ten pounds, what deduction would follow as to the existence or non-existence of an intent to pay the tax? Must the weight of the narcotics be ascertained before the existence or non-existence of intent can be determind? This cannot be the law.

Is Judge Dooling's opinion to be so construed as to mean that "goods or commodities for or in respect whereof any tax is or shall be imposed" not manufactured or known at the time of the enactment of the statute or not then in commerce as articles thereof were not in contemplation of the statute, and that therefore though subsequently recognized in "delinquencies created by the Harrison Act" the statute cannot be applied? No. For the statute itself discounts this assumption, for the words therein "or shall be imposed" show that Congress had in mind the fact that new "goods or commodities" are daily coming into existence and that future sessions of that body may from time to time extend the provisions of its tax statutes to cover and include such new commodities.

The Supreme Court of the United States in the case of J. W. Goldsmith, Jr.-Grant Company vs. United States hereinbefore cited, held that the automobile in said case referred to so used by a person who had it on credit from an owner who retained the title is subject to libel and forfeiture although the owner was without notice of the forbidden use, and that the statute treats the "thing" as the offender.

Judge Dooling in his opinion herein (Transcript of Record, p. 21) in commenting upon that part in Judge Cushman's opinion (reported in 286 Fed. 204) dealing with the terms "concealed" and "deposited" says: "I am not sure that being 'concealed' and 'deposited' in the pocket of the driver, he being in the automobile, the narcotics may not well be said to be 'concealed' and 'deposited' in the automobile as well."

We agree with Judge Dooling in questioning Judge Cushman's interpretation of these terms and sumbit further: that the Government in this case has sustained the burden of proving the intent of the driver to defraud the Government of the taxes then and there imposed by law on said narcotics; that in none of the cases herein cited by the Government has it been shown that

the "removing" or "removal" was a "removal from some definite place where the tax imposed is due and where it should have been paid before the taxd articles are taken therefrom" but on the contrary they were just such cases of "removal" as this one; that though the tax was imposed by the Harrison Act there was also a violation of Paragraph 3450, the general taxing act of Congress, in this regard.

Respectfully submitted,

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